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No. 2440.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN RICHARDS,

Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a Corporation,

Defendant in Error.

Brief on Behalf of Plaintiff in Error.

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BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error in an action at law brought by the American Bank of Alaska against Edward Williams and Edwin Richards by the filing of a complaint in the District Court of Alaska, Fourth Division, on the 14th day of August, 1912, to recover on a certain promissory note dated *February 24, 1911,*

for $3500 and also to recover for an overdrawn account at the bank in the sum of $327.96, which latter cause of action was thereafter dismissed by the plaintiff (Tr., 12). The complaint alleges that the defendants were *mining* co-partners, engaged in business in the Iditarod District of the Territory of Alaska, under the name of Richards & Williams. That in the month of September, 1910, the bank loaned the defendants a sum in excess of thirty-five hundred dollars, which the defendants agreed to repay, and on the 24th of February, 1911, made the note in controversy in consideration of the moneys theretofore loaned. That the note and interest were never paid. And judgment is asked for the face value interest, and attorneys' fees as provided in the note (Tr., 3).

Williams defaulted but his default was never entered until the close of third trial of the case (Tr., 244). Richards answered, denying all allegations of the complaint (Tr., 9). It appears that the verdict and judgment from which this appeal is taken was had after three trials, the last resulting in a verdict against the defendants as "co-partners Richards & Williams and the defendant Edwin Richards" in the full amount of the note, without interest, and allowed attorney's fees in the sum of $750.00 (Tr., 15-16).

Upon the trial the following facts were developed:

Edwin Richards had mined on quite a large scale on Dome Creek near Fairbanks for several years,

and in 1908 went into the Hot Springs District and commenced mining operations with a large plant and machinery on Cache Creek, where he had an interest in some twenty claims (Tr., 192), and was still working them at time of trial. He was a man of good financial reputation and his standing was excellent with the banks (Tr., 163, 171). Prior to going down from Dome Creek, Williams, whom Richards had known in Dawson, had been employed by him on Dome Creek for a year or more (Tr., 60, 192). He was a sort of general hanger on around Richards, doing the cooking when Richards had men enough without his mining and mining otherwise. When Richards went to the Hot Springs, Williams followed him down and worked for him, chiefly at cooking, during the summer of 1909 (Tr., 22, 61, 191-2). At this time Richards was working a lay over on Cache Creek, but going out in the fall, turned the lay over to Williams and a man by the name of Johanson, together with the plant, the stuff in the mess house, etc., and left them some little credit at the store. The result of this lay was disastrous, as when they quit in August, 1910, they owed Richards six or seven hundred dollars, which was a dead loss to the latter (Tr., 62-3, 192). In the spring of 1910, Richards returned to Cache Creek but was hurt and spent a good part of the summer at the hospital and at Gibbon, but when he got back to Cache Creek he lived at the same mess house as Johanson and Williams, and had a

cabin close by. There was a phone theretofore paid for by Williams and Johanson, but when Richards came he used it and paid his share of it, but there was no partnership of any kind claimed between them (Tr., 63, 193). In the spring of 1910 Williams was in correspondence with a man by the name of Boulton, who owned a half interest in a lease on Flat Creek, in the Iditarod country, a distance of about 1100 miles from the Hot Springs country. Williams and Boulton had been old-time friends and partners in Dawson (Tr., 60, 61). Boulton represented to Williams that he had a lay and was having trouble with his partners and wanted Williams to come down and buy a quarter interest in it. Boulton knew that Richards had money and Williams admits that he may have told Boulton that. In any event, Williams spoke to Richards about this lease when Richards returned to Cache Creek in 1910 and they had some talk of no particular importance about it. Later, in September, 1910, a telegram came from Boulton, addressed to Richards at Hot Springs to "send $2000 at once through N. C. fifty thousand at stake. Freeze out game, don't fail to see letter" (Tr., 69, 196). It was phoned to Richards at Cache Creek. Richards showed the telegram to Williams with the statement that he didn't think it was meant for him and that it must have been for Williams. This letter referred to was afterwards received by Williams, being addressed to him, and was forwarded to the Iditarod

(Tr., 70). But they discussed the matter and Richards said he could not go down or send any money down, and didn't want anything to do with it, but being desirous that Williams should have a chance, asked Williams if he would like to go, who responded "what was the use of talking, he had no money" (Tr., 71, 197). To which Richards replied, "Well, if you think you could do yourself any good by going down there I would give you the money to go down." Williams was only too glad of the opportunity. In a day or two Richards and he went to Hot Springs and Richards gave Williams some $2500, a $2300 check and $200 in currency (Tr., 73, 200).

Williams, who was the chief witness for the bank, testified that he then went immediately to the Iditarod; that he had no understanding whatever with Richards that he was to go down there and buy the quarter interest from Boulton and take an assignment in the name of himself and Richards; that he had no verbal or written contract with Richards that he would go down there, buy into that lease on Flat Creek for the benefit of himself and Richards, and that they would mine there as mining co-partners that summer. There was nothing said about a co-partnership name or that he was to put the money Richards gave him in the name of the partnership of Richards and Williams, or about dividing profits and losses, but he was to go down there and use his

judgment about buying. In fact, he testified that he expressed his appreciation to Richards in giving him the money to go, saying he would do the right thing in return, and went (Tr., 78-9-80-81).

Richards charged Williams up in his private books in a personal account standing in Williams' name for the $2500 advanced, and for the moneys paid for the boatman who took Williams to Gibbon on the way to the Iditarod. This was outside of the account standing on Richards' books in the name of Williams and Johanson regarding the money they owed him on the lay which had proved a failure (Tr., 228).

Notwithstanding this Williams went to the Iditarod and first deposited the money with the Miners' & Merchants' Bank in his own name (Tr., 81-85). He met Boulton, found he was having trouble with his then partners, Shively and Kennedy, who owned half of the lay, and he bought half of Boulton's interest, or a quarter of the whole lay, at $2000. Boulton wanted him to buy out the other two and he decided to do so (after going out and looking over the ground) at a cost of $4500. It then became necessary to raise the extra money. He could not get it at the Miners' & Merchants' Bank where he had deposited the $2300 in his own name. Nor did he offer there to get the money on a paper signed Richards & Williams (Tr., 87). But he went to a man by the name of Morgan who knew Richards, told him what he wanted; that he had no power of attorney from

Richards but he would like to make a loan and *considered* Richards his partner. Then Morgan introduced him to Hurley, president of the plaintiff, and he told Hurley the same thing.

Hurley knew Richards by sight, and knew he was a man of means, employed people and responded to all his obligations, although he had never heard or knew of Williams when he came to the bank, and testified he would not lend him any money (Tr., 171-5). But upon Williams' statement that Richards was his partner and without wiring or writing Richards, or making any inquiries to establish the fact, loaned Williams $3500 which was placed to his credit under the name of Richards & Williams. Prior to this Williams had taken the money Richards had loaned him from the Miners' & Merchants' Bank and deposited it with the plaintiff under the partnership name of Richards & Williams, at Hurley's suggestion (Tr., 32). A note was made payable in ninety days, dated October 6, 1910, signed Richards & Williams by Ed. Williams (Tr., 34). The Bank never notified Richards of the making of this note in any way. Hurley advised Williams to notify Richards, which the latter did, fairly describing the transaction (Tr., 39), which letter Richards received on December 7th, to which he replied in effect, denying Williams' right to sign his name to the note and more or less upbraiding him for doing so (Tr., 44). Later, Richards wrote a letter dated December 16th, severely

criticizing the action of Williams in signing his name to the note, one sentence in which was to the effect that he (Richards) "would not be responsible for any note, check or any other written instrument to which Williams might have signed or should sign his name to in the Iditarod Country." This letter was proven by the defense to have been destroyed by Williams, but the contents were shown beyond all question by Richards (Tr., 204), and admitted by Williams (Tr., 96, 97, 113, 115, 116, 117). Richards wrote another letter couched in milder language on December 26th, 1910, but along the same general lines (Tr., 51). Williams received these letters in the Iditarod in the latter part of January, 1911 (Tr., 99), and informed Hurley of at least a portion of their contents. From the time that the note of October 6, 1910, was due and payable in January, 1911, Hurley was constantly pressing payment up to the making of the note of February 24, 1911, sued on in this action. Williams had informed Hurley that Richards did not want to stay in the transaction and that he would have to get other partners (Tr., 101), and Hurley was aware that he was negotiating and did finally make a sale of a half interest to two men by the name of McKenzie and McLellan (Tr., 124), retaining a quarter interest.

On February 24, 1911, Hurley insisted on the giving of the new note and also required the making of a mortgage on the three-quarter interest in the lease. He had Williams send a blank bill of sale to Rich-

ards, by which the latter conveyed to Williams all his interest in the lay, with the understanding on the part of Hurley and Williams that if a new note was executed and a mortgage covering the three-quarter's interest in the lay, that when the bill of sale came back from Richards, Richards should be released from all responsibility (Tr., 102-3-4). The new note, and mortgage to secure it, were made as between Edward Williams and Edwin Richards as parties of the first part, and American Bank of Alaska, as the second party. It was distinctly understood by Hurley at the time of the making of this new note and a mortgage to secure it, that Williams had no power of attorney or any written authority to act for Richards or sign his name and discussion was had relative to the fact. Counsel was taken with attorneys and it was finally decided that Williams should sign his name and Richards' name by himself as attorney in fact, notwithstanding that Williams had no power of attorney, Hurley remarking that it wasn't business, but he would take a chance on it (Tr., 89).

The note and mortgage were then executed in that form (Tr., 31, 88-89, 166-7, 180). When Williams purchased the interest of Shively and Kennedy at the time of obtaining the $3500 on the first note, he took the assignment of the interest in the name of Williams & Richards, but making a note to Kennedy for a part of his payment (some eight hundred dollars), he signed his own, not Richards' name (Tr., 91-2).

There were some moneys owing by Kennedy and Shively, and Williams paid a part of the purchase price in checks to various poeple, and he did not sign Richards' name or any partnership name to these checks, but signed his own. He bought a boiler for $2100 to be used in working the lay, paying $700 cash to one Tom Aitkin, and gave a note in his own name to Aitkin for the balance. In fact, never signed any notes or contracts in the name of Richards or of the alleged partnership, other than the original note of October 6th, and the note of February 24th in suit (Tr., 92-3), which it appears was done solely on the suggestion of Hurley. The evidence shows both from the testimony of Williams and his correspondence with Richards that he was very apprehensive about the result of his making these notes in Richards' name and his lack of authority to do so. As he testified, he felt that he had placed himself in a very delicate position (Tr., 118). The Bank never notified Richards at all of the making of the first note, although Hurley testified that it was entirely "on the strength of the statement made by Williams that Richards was his partner and upon the strength of Richards' name" that the money was loaned (Tr., 173-189). And Richards never knew or heard that the assignment of the three-quarter interest in the lease was taken in his name, together with that of Richards, until May, 1911, when he received the blank quit claim deed to execute, reconveying to Williams, with

a request that he sign it and send it back, which he did (Tr., 228). This was the letter of April 4, 1911 (Defendant's Exhibit 2) (Tr., 124), wherein he was told that if he would sign and send this bill of sale back, conveying to Williams, he would be released of all obligations, and in which letter Williams said, "if you want some security for the money you gave me I can give you the quarter interest which I still hold" (Tr., 125).

During the summer of 1911, mining operations were carried on on quite an extensive scale on the lay on Flat Creek by a copartnership composed of Williams, Boulton, McLennon and McKenzie, and there was no claim whatever from anybody that Richards had any more to do with these operations than had the Czar of Russia or the Kaiser Wilhelm. During the summer of 1911, the plaintiff collected large sums of money from that outfit (Tr., 184-187). The clean-ups were pretty good until August and the firm had deposited gold dust to meet their checks at the Bank to the extent of possibly fifty thousand dollars, and when the mine closed down, there was an overdraft of some three hundred odd dollars (Tr., 186-187), the amount of the second cause of action dismissed (on second thought by the Bank), as the evidence conclusively showed that Richards never had anything to do with these mining operations at Flat Creek or at any other point in the Iditarod District.

So far as the note of February 24, 1911, is con-

cerned, Richards never heard of this note until he received a letter which was written by the Bank some time in October and received by him on December 28, 1911, at San Francisco. This letter was ruled out as well as the reply of Richards thereto, written four days later and dated January 2, 1912, in which he expressed his surprise and repudiated the note in unmistakable terms (Tr., 206-208). Later, in the year 1912, he was in Fairbanks and went to the Bank and again repudiated the note (Tr., 211). This Hurley also admits (Tr., 245). Action was brought on the note in the following September, resulting in a verdict for the Bank in the full face of the note but without interest, although interest was shown to have accumulated to the amount of $1295 (Tr., 168).

Upon this verdict a judgment was rendered against Richards and Williams and against Richards individually for $3500 and an attorney's fee of $750.00; and against Williams individually for $3500 with interest from February 24, 1911, at 12 per cent. per annum and attorney's fees in the sum of $750.00 (Tr., 19).

By reason of this judgment and because of numerous errors in the instructions to the jury, as well as in the rulings on the evidence, Richards felt himself aggrieved and prosecutes this writ of error, specifying as reasons for a reversal of the judgment of the Court below, the following errors, to wit:

ASSIGNMENT OF ERRORS.

I.

For the error of the trial Court in instructing the jury orally, on its own motion in the following language:

> "On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership, and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod, and after such investigation, that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to Iditarod, pursuant to such agreement, and did purchase for said partnership an interest in a lay or lease on Flat Creek and, for the purpose of making such purchase, did borrow the sum of thirty-five hundred dollars from plaintiff, and, on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams & Richards.
>
> "Plaintiff further contends that Richards was informed by Williams of this transaction, and that he ratified the same, and that thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence, bearing date on that day, and that the same was given for

the money theretofore loaned, and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams & Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards."

II.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

"You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the monies borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards."

III.

For the error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that if you find from the evidence in this action that such partnership was formed with the defendants, and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such partnership

purposes, and the notes above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff."

IV.

For the error of the Court in instructing the jury orally, on its own motion, as follows:

"In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transactions between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

"You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards, or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that

the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

V.

For error of the Court in instructing the jury orally, on its own motion, as follows:

"You are instructed that if you find from the evidence in this case that, subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the defendant Richards, and informed him that the said monies so borrowed in the name if Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence or ratification of the acts of Williams by Richards."

VI.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.

"And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts of Williams within a

reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another."

VII.

For error of the Court in instructing the jury orally, on its own motion, in the following language:

"You are instructed that no authority in writing is necessary to authorize another to sign his name to a note, provided the authority is given in some way, or provided the acts of the party so signing another's name to the note are ratified by that other afterwards with full knowledge of what has been done. And in this case if the note was signed in the name of Richards & Williams with the intention on the part of Williams to bind both parties, and he either had such authority from Richards beforehand, or if Richards, with full knowledge of what had been done, ratified such act afterwards either by affirming the same or by failure to notify the payee of the note that the same was signed without his authority, within a reasonable time, then he may be held to have been bound in the same manner as if such authority had been given in writing beforehand."

VIII.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 2, which is in the following language:

> "The Court instructs the jury that a mining partnership can only exist where several parties co-operate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.
>
> "Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners they are not liable thereon.
>
> "Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining copartnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such copartners but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or

consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank, for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country and that said money was so used, then in either event the defendant Edwin Richards is not liable upon the said note; unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams. The word 'ratification' means a confirmation of a previous act done by another."

IX.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 3, which is as follows:

"The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner or that he is that other's agent with the authority to sign promissory notes by reason of such copartnership, is not evidence of a mining partnership or agency, as against such other person.

"Applying the foregoing rule of law to the testimony in the case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for $3,500.00 was signed by the defendant Edward Williams in the name of 'Richards & Williams' as shown by Plaintiff's Exhibit '5,' the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining copartners, and for that reason he was authorized to borrow money and sign the firm name 'Richards & Williams' to a

promissory note for the amount of money so borrowed, then I charge you that under such circumstances the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams, and if you find from the evidence that the said officers failed to make such inquiries and that Williams was not at the time a mining copartner with Richards and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

"The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit '5,' applies with equal force to the note, Plaintiff's Exhibit '6,' made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Richards is concerned, growing out of the signature thereon 'Richards & Williams.'

"The note in action (Plaintiff's Exhibit '6') is also signed by individual names as follows: 'Edward Williams, Edwin Richards by Edward Williams, his attorney in fact.' With reference to such signatures, you are instructed that as the name of defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find

from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of the said note, ratified the action of the said Edward Williams in the execution and delivery thereof."

X.

For the error of the Court in refusing to give the special instruction requested by the answering defendant Richards and numbered 4, which is as follows:

"Where a promissory note is signed by one person for another as that other's Attorney in Fact, as the note copied in the complaint was, the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other in fact held a power of attorney or other written authority to so act, and if it turn out that he did not have such written authority the note is void as against such other.

"Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note copied in the complaint was ineffectual to bind Richards and he would not be liable for the payment thereof; unless you should further find from a preponderance of the evidence that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the said note."

XI.

The Court erred in sustaining the objection of plaintiff to the three letters of the defendant Edward Williams to defendant Edwin Richards, which said letters tended to contradict the oral testimony, and oral and documentary evidence of the said Williams when on the witness-stand, and were proper cross-examination of the said Williams as a witness, which said letters were marked Defendant's Exhibits 3, 4 and 5, for identification, respectively.

XII.

The Court erred in sustaining the objection of the plaintiff to defendant's offer of a letter from defendant Edwin Richards to the plaintiff Bank, which was marked Defendant's Exhibit No. 6, for identification, and is in the words and figures as follows:

"WINCHESTER ANNEX.
Third Street.
San Francisco, Cal., Jan. 2/12.

American Bank of Alaska,
Fairbanks.

Mr. Bruning,

Dear Sir: I have just received pass book and a note concerning a note from Iditarod for $3500.00 and overdraft for a sum $327.00 which had evidently been long on the way, but will comply with an answer at once, as it is a surprise to me, I am sure you are aware I have not signed that note, neither was Williams or any one else authorized to do any business of that nature in

my name, as for the overdraft, also I had nothing whatever to do with their operations at Iditarod. I stand ready at any and all times to settle my accounts, as my record up in Alaska will show, and if any further information in this matter is required, my address at present is above, but I expect to be in Fairbanks about end of March this year, when I will call on you on my way back to Hot Springs.

Respectfully yours,
(Signed) EDWIN RICHARDS."

XIII.

The Court erred in denying the motion of the answering defendant Richards for a new trial, on the grounds stated therein.

XIV.

The Court erred in receiving the verdict of the jury and rendering a judgment thereon, and especially in rendering a judgment against the answering defendant Richards as a member of a supposed firm of Richards & Williams, and against said Edwin Richards as an individual, for the sum of $3,500.00, and an attorney's fee of $750.00, and all the costs of the action to be taxed by the Clerk.

ARGUMENT.

The case was tried by plaintiff on the theory that while Williams had no authority as a mining partner nor in virtue of any written power of attorney to sign Richards' name to the notes or to any other writings, yet that Williams having executed the note of October 6, 1910, with an understanding that it was to be renewed, if so desired (and of which understanding there is no foundation in fact in the evidence), and Richards having been notified by Williams of the making of the note of October 6, 1910, and never having repudiated the said first note *to the Bank,* that he was liable on the renewal note notwithstanding he never heard of it until December 28, 1911.

Our position is this: That upon the evidence the only legitimate theory that plaintiff could have proceeded upon was ratification, and that ratification could not possibly have taken place in this case unless Richards having full knowledge of all the facts and circumstances and the claims by the Bank of his liability had remained silent for a considerable space of time and in that way acquiesced; or by some unequivocal statement admitted his liability on the note. The facts developed on the trial show neither of such conditions; in fact, as we claim they show a complete disaffirmance of the note of February 24, 1911, sued on as soon as knowledge of its making was brought to the attention of Richards.

We therefore contend that the Court erred in instructing the jury on its own volition in the following particulars, viz.:

I.

The Court erred in instructing the jury on its own motion that:

> "On the part of the plaintiff it is contended that in the latter part of September, 1910, in the Hot Springs Precinct in this Division, the defendants Williams and Richards entered into an agreement of partnership whereby Richards agreed to advance a certain amount of money for the use of such partnership and the defendant Williams agreed to proceed to the Iditarod and to investigate conditions there, and that it was also agreed between them that if it should seem advisable to said Williams, after arriving in Iditarod and after such investigation that he should purchase an interest in a certain lay or lease upon a mining claim on Flat Creek. It is further contended by the plaintiff that Williams did proceed to the Iditarod pursuant to such agreement and did purchase for said partnership an interest in a lay or lease on Flat Creek, and for the purpose of making such purchase did borrow the sum of thirty-five hundred dollars from plaintiff, and on or about October 6, 1910, made and delivered to plaintiff a promissory note therefor, signed by Williams in the name of Williams and Richards.
>
> "Plaintiff further contends that Richards was informed by Williams of this transaction and that he ratified the same and that thereafter on or about the 24th of February, 1911, the defendant Williams executed to the plaintiff the note which has

been introduced in evidence, bearing date on that day, and that the same was given for the money theretofore loaned and in renewal of the note made on or about October 6, 1910, and that this note was executed as the note of Williams and Richards, and that Williams was authorized to execute such note on behalf of the defendant Richards" (Assignment I, Tr., 273-4).

Said instruction is erroneous:

(1) In that it assumes a state of facts and a theory not shown by the record or advanced by plaintiff.

There is absolutely nothing in the transcript to show that in the transaction between Williams and Richards any amount of money was spoken of save the twenty-five hundred dollars which was given Williams by Richards. There is not a scintilla of evidence in the record that Williams was authorized to borrow any money on behalf of Richards or on behalf of the so-called partnership of Williams and Richards. This instruction is misleading in that it holds out to the jury the idea that the contention of plaintiff was that Williams had power in the first instance to borrow money in Richards' name or as a member of the alleged partnership.

Williams was the leading witness for the plaintiff. Out of his mouth we should expect certainly to look for confirmation of any such theory or evidence upon which to base such a statement. What does he testify to?

That when Boulton sent the telegram relative to the

purchase of the quarter interest and that he wanted $2000.00 right away to protect himself against a freeze out game, he stated therein that a letter was to follow which Williams afterwards received in the Iditarod; that Richards asked him if he would not like to go down there and buy in the interest from Boulton and he responded, "What is the use of me talking, I have not got any money. Those are the words" (Tr., 70-71).

That Williams offered to let him have the money and did give him $200 in cash, and a $2300 check (Tr., 73), and he further testified on cross-examination as follows:

> "Q. Did you have any conversation with Richards at any time after getting this telegram from Boulton between that and the time you left that you would go down there and buy a quarter interest or any interest with Boulton and take the assignment of the lease in the name of yourself and Mr. Richards?
>
> "A. No sir.
>
> "Q. Did you have any conversation with him or did you have any verbal contract or any written contract that you would go down there and buy into that lease on Flat Creek and that he and you would mine there as *mining co-partners* during the Summer 1911?
>
> "A. *No sir.*
>
> "Q. Was there anything said between you—now I am talking about down there at Hot Springs and before you left—about any partnership name?
>
> "A. *No, there was not.*
>
> "Q. Was there anything said about you going

down there and putting that money he had given you in a bank in the name of the partnership of Richards and Williams?

"A. *No sir.*

"Q. Was anything said between you about dividing profits and losses of any business down there?

"A. *No sir.*

"Q. Was there anything said between you about your buying anything at all with that $2500 other than a quarter interest in the Boulton lease?

"A. I can't say we discussed about buying. *I was just given the money* and sent down there to use my own judgment" (Tr., 79-80).

And before going he expressed his appreciation of the kindness of Richards in giving him this money to go, saying he would do the right thing in return (Tr., 81).

Here is a plain tale that he who runs may read. Not a word as to the advancement of any further money; not a word as to the inception of any partnership, mining or otherwise; not a word as to the operation of any mines together, not a word as to the borrowing of any money or the creation of any liabilities as against Richards. Just another chance given (in addition to the former one in the lay on Cache Creek) by a big-hearted man more fortunate in his mining deals to his less fortunate friend, a chance for him to make good and a possible repayment of the money to Richards in the future with interest.

(2) The said instruction is further misleading in this:

It instructs the jury that the contention of the plaintiff is that "the defendant . . . entered into an agreement of partnership . . .," whereas the allegation of the plaintiff's bill is that a limited or *mining* partnership was entered into as between them.

It could not contend one thing in pleading and another on the trial.

It would be useless to waste the time of the Court by citation of authority that the allegata and probata must agree and necessarily where the issue raised by the pleadings is as to the existence of a *mining* partnership limited and confined in its character, plaintiff could not in the face of such issue contend that there was a general partnership.

So the Court has in this respect certainly erroneously instructed the jury for no such contention is shown by the transcript.

(3) To further analyze this instruction:

The Court jumps from the proposition of a general partnership agreement (wherein it was the contention of plaintiff, as the instruction asserts, that Williams had been given power to and did in pursuance of such general partnership agreement, borrow some $3500 and execute the note of October 6, 1910) to a statement that Richards was informed of the making of this note and ratified it. In other words, the Court

instructs that plaintiff's contention is both as to an antecedent power given Williams to borrow the money represented by the note of October 6, 1910, and a subsequent ratification. And then goes on further to instruct as follows as to plaintiff's further contention:

> "That thereafter on or about the 24th day of February, 1911, the defendant Williams executed to the plaintiff the note which has been introduced in evidence bearing date on that day, and that the same was given for the money theretofore loaned and in *renewal* of the note made on or about October 6th, 1910, and that *this note* was executed as the note of Williams and Richards and that Williams was authorized to execute such note on behalf of the defendant Richards."

It is difficult at first blush to ascertain what was meant by the foregoing statement—whether plaintiff's contention was that Richards authorized the execution of the note of February 24, 1911, or whether it was the note of October 6, 1910, that Williams was authorized to execute. But upon a second reading it is evident that it was the note of October 6, 1910, that the Court must have intended to refer to, for it was this note that Williams executed in the name of the firm; the note in suit was signed by the individual names, Williams signing as the attorney in fact of Richards, (although stating to Hurley that he had no power of attorney to do so) and also signing the firm name.

And such contention, i. e. that Williams was *author-*

ized to execute the note of October 6, 1910, has as we have shown, no foundation in the evidence, and certainly no foundation in the pleadings, as the making of that note was not in issue, nor did the plaintiff contend on the trial that said note was authorized.

So far as the first note was concerned the testimony is uncontradicted that when Williams reached the Iditarod he deposited the money ($2000) given him by Richards in the Miners' & Merchants' Bank in his own name; that when he decided to purchase the additional interest of Shively and Kennedy he tried to negotiate a loan with that Bank in his own name; failing in that, he went to the plaintiff bank and informed its president, Hurley, who was familiar with the financial standing of Richards, that he had no power of attorney from Richards but considered him his partner and that he would sign up a note in Richards' name if Hurley would negotiate the loan from the Bank, which upon those facts Hurley agreed to do (Tr., 91-2). Afterwards in a strongly apologetic spirit he wrote Richards a statement of the transaction (Tr., 39), to which letter (received by Richards on December 7, 1910), the latter made reply denying the right of Williams to use his name in the note (Tr., 44).

Later on December 16, 1910, Richards wrote another letter severely criticizing the action of Williams in signing his name to the note, and in that letter stated that he would not be responsible for any note,

check or any other written instrument to which Williams might have signed his name. It is true this letter was not introduced, but it was proven to have been destroyed by Williams and the contents were shown beyond all doubt by Richards and admitted by Williams (Tr., 96, 97, 113, 115-16-17).

All of the foregoing instruction was given by the Court of its own motion. There is not a word as to the issue raised by the pleading which was confined to the making of the note of February 24, 1911. There is nothing in the testimony to warrant the statement contained in such instruction. It is neither based on the issues raised by the pleadings nor upon any evidence in the case.

It is error for the Court to have advanced a contention not based upon any evidence in the case or raised by the pleadings. Such a charge can do nothing but embarrass and mislead the jury. It certainly cannot aid them in determining the real facts but can only lead to mental confusion.

> "Instructions must be applicable and limited to the issues raised by the pleadings."
>
> Vol. 10, *Ency. U. S. Sup. Ct. Repts.*, p. 41;
> *Brickwood-Sackett Instructions*, Vol. 1, Secs. 170-171;
> Vol. 15, *Ency. Pl. & Proc.*, p. 944.

Where plaintiff's case rests upon an alleged positive *misrepresentation* of existing facts, a charge which

assumes that it is based upon a *fraudulent suppression* of material facts, knowledge of which defendant is under some legal duty to disclose, *not being within the pleadings,* is erroneous.

Thorwegan v. *King,* 111 U. S., 549, 555.

There must be some evidence on which a charge to the jury is founded, otherwise it cannot lawfully be given.

White v. *Burnley,* 20 How., 235; 15 L. Ed., 886;

Mitchell v. *Potomac Ins. Co.,* 183 U. S., 42; 46 L. Ed., 74.

II.

The Court erred in instructing the jury on its own motion as follows:

> "You should consider therefore whether or not the defendants Williams and Richards entered into *any* partnership agreement as alleged by the plaintiff and whether or not, if you find that they did enter into such agreement it was contemplated thereby that the said Williams should have authority to borrow money for the purposes of such partnership and whether or not the moneys borrowed by him from the plaintiff were for such purposes, if you find that a partnership had been formed theretofore between Williams and Richards" (Tr., 275).

Said instruction is susceptible to the same criticism as the preceding one in that it is misleading, again referring to a general partnership, instead of to a mining partnership as pleaded.

There is a wide distinction between a mining and a general partnership.

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom *actually engage in working* the same."
>
> 3rd Ed. *Lindley on Mines,* Sec. 797, Vol. 3.
>
> *Skillman* vs. *Lachman,* 23 Cal., 199;
> *Hartney* vs. *Gosling* (Wyo.), 68 Pac., 1118.

The chief characteristic therefore of a mining partnership is a joinder in operating a mining claim. No such joint action was shown here. No pretense was made that Richards had anything to do with the operation of the lease bought into by Williams. When the latter took the assignment of the Shively-Kennedy interest at the time of obtaining the $3500, while he took it in the name of the alleged partnership, he made a personal note for a balance due Kennedy of $800, signing his own and not Richards' or the partnership name to the same (Tr., 91-2). In settling up for some of the indebtedness due from Kennedy and Shively he paid the same by his own personal check and not in the name of the alleged partnership or

that of Richards. In purchasing a boiler to be used on the lay, he paid $700 in cash and gave his personal note to one Aitkin for the balance (Tr., 93). During the summer of 1911, the mining operations carried on quite extensively on the ground were so carried on by copartnership composed of Williams, Boulton, McLennan and Mackenzie. Plaintiff collected large sums of money from this outfit during that summer (Tr., 184-187) and there was no claim made by anybody that Richards had a thing to do with these operations even in a remote degree.

Had there been any evidence of a mining copartnership there would have been no implied authority in Williams to execute the note in controversy by reason thereof. Such authority must have been express or the making of the note must have been necessary in the business of the mining partnership.

In the oft cited case of *Smith* vs. *Sloan,* 37 Wis., 286, 19 Am. Rep., 757, where the authorities are collected, the well known rule is laid down that one partner in a *non-trading* partnership cannot bind his copartner by a bill or note drawn, accepted or endorsed by him in the name of the firm, nor even for a debt which the firm owes unless he has express authority therefor from his copartner, or unless the giving of such instrument *is necessary to the carrying on of the firm business,* or is usual in similar partnerships; and the burden is upon the holder of the note to prove such authority, necessity or usage.

See also:

Lindley on Partnership, Vol. 1, p. 302;
Hartley vs. *Gosling, supra;*
Skillman vs. *Lachman, supra;*
Manville vs. *Parks,* 2 Pac., 212;
Faires vs. *Rose et al.,* 18 S. W., 418;
Snively vs. *Matthewson,* 40 Pac., 628.

But the evidence fails to show the existence of a *mining* partnership. And as appears from the testimony of Williams, quoted under our first specification of error, there was neither a general nor mining partnership agreed upon at Hot Springs as between him and Richards.

It is clear that such instruction is not based on the issues raised by the pleadings, nor upon any of the evidence, and particularly that portion thereof that authorizes the jury to inquire whether any partnership agreement between Williams and Richards contemplated the borrowing of money for partnership purposes and as to whether moneys borrowed from plaintiff were used for such purposes. There was absolutely nothing in the evidence to show any agreement that Williams was given the right to borrow moneys in Richards' name or in the name of any partnership. Such an instruction could only serve to divert the attention of the jury from the real question, i. e., as to whether there had been any ratification of the un-

authorized action of Williams for there certainly was no evidence whatever of any prior authorization.

III.

The Court erred in instructing the jury on its own motion as follows:

> "You are instructed that if you find from the evidence in this action that *such* partnership was formed with the defendants and that it was contemplated thereby that Williams should have authority to borrow money for the partnership use, and that such sum of money was borrowed from the plaintiff by Williams for such purposes, and the *notes* above mentioned given to plaintiff therefor, then your verdict should be for the plaintiff."

This instruction is in line with the two preceding ones and subject to the same criticism, and further is indefinite and misleading. The Court says: "You are instructed that if you find from the evidence in this action that such partnership was formed," etc. In the first instruction objected to he states that the plaintiff's contention is (in violation of the pleadings) that a general partnership was agreed upon. In the second instruction he says "You should consider whether Williams and Richards entered into *any partnership* as alleged in the pleadings" * * *. In this instruction they are to find for the plaintiff if they decide from the evidence "that *such* partnership" was formed. What partnership? The general one contended for as the Court states in the first in-

struction, or the mining partnership set up in the pleadings?

It is impossible to state. We can but reiterate that by the chief witness offered by the plaintiff (Williams), who voluntarily came without subpoena 1,000 miles to testify (Tr. 135), it was conclusively shown no general partnership was entered into; the evidence showed conclusively no mining partnership was carried on as between them. In fact, no partnership of any character was shown.

Furthermore, the issue tendered by the complaint was as to the making of the *note* of February 24, 1911. It will be remembered that this *note* was signed in the individual name of Richards by Williams as his attorney in fact, admittedly without any power of attorney by Williams to act for Richards or sign his name. Conceding for the purpose of the argument that Williams might have had power to make the original note of October 6, 1910, (although none is shown by the record) yet it did not follow that he would have power to make the note given as is claimed in renewal and sign Richards' name thereto. There is nothing to show that any renewal of the first note was ever contemplated, even as between the plaintiff and Williams.

Conceding *pro argumenti* that Richards was liable on that note, plaintiff should have pursued his remedy on that note or hold Williams alone liable on the second note, for the evidence shows that at the time of

the making of the note sued on, the partnership, if any can be said to have existed between Williams and Richards had been dissolved, so that in this respect the Court obviously erred when it instructed as to the "notes."

The first note came due in January, 1911. On cross-examination Williams was forced to admit that he had received a letter from Richards, subsequently destroyed (the letter of December 16, 1910) and testified in regard thereto as follows:

> "Q. You will not deny that he (Richards) used this very language I have read in that same letter, will you? 'I will not be responsible for any notes or whatever else you have signed my name to. Let me know as soon as possible if you have revoked the same'?"
>
> "A. I cannot admit it.
>
> "Q. You will not deny that he used language similar to that?
>
> "A. I admit he used language—the chances—I admit there might have been a sentence in it to that effect, but I do not know that those were the words that Richards wrote to me and that I received * * *" (Tr. 97).
>
> * * "Q. You gave this note in suit here (the last note, February 24, 1911) didn't you?
>
> "A. Yes, sir.
>
> "Q. That is going on two months after, isn't it?
>
> "A. Yes, two months.
>
> "Q. Did you have any conversation with Hurley in the meantime?
>
> "A. *I think I went into the Bank one day and told him I had not got the money and Mr. Rich-*

ards said he would not do any more at present. * * * some time after the note was due (Tr. 99-100) * * *.

"Q. Mr. Hurley was either talking to you or sent you word that you had to do something with this debt of $3500, didn't he after it became due?

"A. Oh, yes, I was informed.

"Q. How were you informed?

"A. *I had to make a change when Richards didn't want to go into it—didn't want to stay in the transaction*—and I told Mr. Hurley that under the conditions I would have to get some other partner in.

"Q. When did you tell Hurley that?

"A. Some time in February, I suppose (Tr. 100-102) * * *.

"Q. Didn't he (Hurley) tell you he was willing to release Richards if you would give a new note and give a mortgage on that lay over there on Flat Creek?

"A. I understood that when I got the bill of sale from Mr. Richards that there was to be another transaction take place and that would release Mr. Richards of all obligations. * * *

"Q. You told Hurley you would do that?

"A. I told him I would.

"Q. When?

"A. Some time in February.

"Q. Did you send a form of bill of sale and transfer up here to Hot Springs for Richards to sign, conveying his interest in that three-quarters interest in the lay back to you?

"A. Yes, sir.

"Q. That was before this note in suit was signed at all * * *?

"A. *I can't recollect* whether it was just before or just about the same time" (Tr. 102) (See also Tr. 53; 103-4).

At this time Williams was making arrangements with McKenzie and McLellan to buy an interest in the ground; of this Hurley had knowledge. Accordingly on April 4, 1911, he wrote to Richards:

> "Well, Dick, I assumed the responsibility of this proposition, *doing as you advised me to do—consider you out of it.* (See letter from Richards to him of December 26, Tr. 52). I was compelled to sell half interest to secure note I gave last fall. In purchasing the bill of sale recorded in yours and my name, but I cannot cancel the note till you send me the bill of sale which you will find enclosed. Then you will be relieved of all obligations in connection with the proposition. Angus McKenzie and Angus McLellan are the parties I sold to. * * * Kindly send the enclosed bill of sale, so that I can relieve you of all obligations. *If you want some security for the money you gave me, I can give you the quarter interest which I still hold.* Hoping this will be satisfactory to you" (Tr. 124-5).

and acknowledging receipt of the deed from Richards, wrote on June 27, 1911,

> "The Guggenheims are in camp. They have options on most of Flat Creek. We let them an option for $33,000. * * * Should they take it up *I will come direct to the Springs and make good.*"

There can be no doubt that Williams and Richards understood and intended that the partnership, if any existed or any interest that Richards had in the trans-

action relative to this lease was terminated at the time that he wrote the letter of December 8, 1910—

> *"Regarding that account at the Bank in both our names, that is certainly a mistake, when I give you the check for the money and you gets a letter of credit on it, my name should not be used at the Bank. I never had the least idea you should assume any obligations beyond what would relieve the situation, and what Jack called for at the time, and now when I see Jack gets some* of the money himself and takes to the woods. And whatever became of that letter he was sending, never showed up here as yet. *Well now Ed, to make this short, I believe the best way out of this, you should try and get some of those moneyed fellows down there to go in with you. Consider me out of it altogether. * * * If you manipulate another deal, it would be better for you to have the bill of sale made over from the old laymen. I sincerely hope you will make out all right, you are perfect welcome to use that money until you can make it.* * * * Kindly let me know if you make out all right. It seems to me you could easily make some transaction to advantage on that kind of ground. *I don't care to go any more"* * * * (Tr. 45-6).

This letter conveyed plainly enough to Williams the attitude of Richards towards the transaction, and he thereupon told Hurley as we have shown above, when Hurley was pressing him for payment that Richards would do no more and he must get new parties into the transaction.

Yet in view of this thorough understanding on Williams' part and his expression of the facts to Hurley

relative thereto, and of the fact that he had no power of attorney from Richards to sign his name, Hurley consented on behalf of the Bank to take a new note from Williams signed in the alleged partnership name the latter agreeing to sign Richards' name to the note also by himself as attorney in fact, Hurley stating he would take a chance on it turning out all right, although it was not business.

Can it reasonably be held in view of those facts that the note in controversy was the note of the mining partnership conceding as we have stated for purposes of argument there had been in the first instance such a partnership? And going further and admitting authority specially given to Williams to borrow in the first instance?

The very fact that Williams signed the note in controversy in the individual name of Richards and not in the partnership name alone as in the case of the first note shows that he recognized the partnership to be at an end and also "took a chance" that Richards in his friendliness toward him might recognize the liability notwithstanding the letter above referred to introduced in evidence and the destroyed letter of December 16, 1910 (contents of which were proven) repudiating any liability on any instruments in writing made in his name by Williams.

Dissolution operates as a revocation of all authority for making new contracts. It does not revoke the

authority to arrange, liquidate, settle and pay those created.

1 *Daniel Negotiable Instruments*, Sec. 370.

Where a note is issued by a partner after dissolution it will not bind the other partners even though given for a debt due by the firm.

1 *Daniel Negotiable Instruments,* Sec. 371;
Whitman vs. *Leonard,* 3 Pick. (Mass.), 177;
Bank vs. *Humphreys,* 1 McCord, 388;
Woodson vs. *Wood,* 5 S. E., 277;
White vs. *Tudor,* 76 Am. Dec., 126;
Palmer vs. *Dodge,* 62 Am. Dec., 271;
Rhodes vs. *Amsinck,* 38 Md., 354.

IV.

The Court erred in instructing the jury of its own motion as follows:

"In case you should find that such copartnership was not formed between the defendants, or that Williams was not authorized to borrow money for partnership purposes, or that the money loaned by the plaintiff was not for partnership purposes, then you should consider whether or not the defendant Richards was informed of the transaction between Williams and the plaintiff, and whether or not the defendant Richards, after having been fully informed of such transactions, ratified the same.

"You are instructed that if you find that the defendant Richards was fully informed of the transactions between the plaintiff and Williams, and

that said sum of money was loaned by the plaintiff to Williams for the use of Williams & Richards, and that on or about October 6, 1910, the defendant Williams executed the note to the plaintiff for said sum of money and signed thereto the name of Richards, or the firm name of Williams & Richards, and that Richards, having been fully informed of these transactions, ratified the same, that then such ratification of the acts of Williams by Richards would have the same effect as if authority to perform such acts had previously been given by Richards to Williams. And, if you find that said acts of Williams were so ratified by Richards, then your verdict should be for the plaintiff, provided you also find that the note in issue was given as a renewal of the note of October 6, 1910, and in consideration of the loan originally made."

It is difficult to point out any one phrase or portion of this instruction as error. It is the instruction as a whole that is misleading and vicious. It assumes a theory of the case not based on the pleadings, not advanced by the plaintiff and not founded on any evidence given at the trial. We think this is apparent from what we have said as to the three preceding instructions. The vice consists in the practical assumption by the Court that there was evidence going to show that Richards authorized Williams to borrow money for the so-called partnership. No evidence of any such authorization is attempted to be shown in the record. We submit that all three and each of these instructions constitute reversible error, for it is impossible to ascertain whether the jury based their

verdict upon prior authorization or subsequent ratification upon which they were instructed by the Court.

V.

The Court erred in instructing the jury on its own motion:

> "You are instructed that if you find from the evidence in this case that, subsequent to the time when Williams borrowed from the plaintiff herein the monies for the recovery of which this action was brought, he communicated fully such facts to the defendant Richards, and informed him that the said monies so borrowed in the name of Richards & Williams were to be used in their joint enterprise, and that said Richards did not, on receipt of such information within a reasonable time notify the plaintiff in this action that he was not a partner of defendant Williams, or repudiate the acts of Williams, that such failure to so notify the plaintiff may be considered by you as evidence of ratification of the acts of Williams by Richards."

This constitutes error in that the Court singled out a vein of evidence and informed the jury that they could consider the same as an act of ratification, casting upon Richards in said instruction a duty to notify the Bank of the repudiation of Williams' action in signing his name to the paper, whereas it was the duty of the plaintiff to notify Richards of the act of Williams in signing his name to the note in suit, and thus give him an opportunity to affirm or disaffirm the same.

The pleading sets up obligations arising out of a mining partnership, under which even if the existence thereof had been proven no right to borrow money would be presumed. Therefore the plaintiff should have been on its guard in treating with any member thereof financially as to his authority to act.

It is provided by Chapter 64, Section 21 of the Session Laws of Alaska (1913) relating to negotiable instruments that—

> "A signature by 'procuration' operates as notice that the agent has but a limited authority to sign and the principal is bound only in case the agent in so signing acted within the actual limits of his authority."

The plaintiff proved out of the mouth of its own President that Williams had no power of attorney to sign the name of Richards to the note in controversy (Tr. 180). Why then should the onus be cast on Richards to notify the Bank that Williams had no power to act when the Bank already knew it? Under the section of the Alaska laws just quoted the fact that Williams signed as attorney in fact should immediately have put plaintiff upon inquiry as to the extent of his power, and imposed upon IT the duty of notifying Richards of the action of Williams, when as Hurley testified he "never understood" that Williams had any authority to sign Richards' name (Tr. 180).

> "The borrowing of money and the giving of negotiable paper is not a necessary or an ordinary

incident of the business of a non-trading association, and when it happens that such a concern does desire to borrow or a member or officer proposes to give or tenders a promissory note in its name, *it is no hardship upon the lender or creditor to require him to look into the authority of one who proposes to bind others who are not present or consenting.*"

Schumacher vs. *Sumner Tel. Co.,* 142 N. W., 1034-1037.

See also:

Anderson vs. *Kissam,* 35 Fed., 699-706;
Coulter vs. *Port. Trust Co.,* 26 Pac., 565.

Further, the Court erred in giving this instruction in that it gave undue prominence to a part of the evidence only, and did not direct the jury to consider the same in connection with the balance of the evidence.

See:

Kimmel vs. *Nagele,* 84 Ill. App., 22 (25),

holding erroneous an instruction that "if you find " from all the evidence in this case that the plaintiff " purchased such notes at a discount of —— per cent., " then you have a right to take this fact into considera- " tion in determining whether or not plaintiff pur- " chased said notes in good faith or not," the Appellate Court of Illinois said:

"This instruction was erroneous because it singled out and gave undue prominence to part of the

evidence only, and did not tell the jury that the same should be considered together with all the other evidence in the case."

See also:

Sprague's Collection Agency vs. *Spiegel,* 107 Ill. App., 508-270;
Vol. 7 *Ency. U. S. Sup. Ct. Rep.,* p. 42;
Richelieu etc. Nav. Co. vs. *Boston Marine Ins. Co.,* 136 U. S., 408, 423;
Hickory vs. *United States,* 160 U. S., 408.

Again, it appeared, as we have heretofore shown, that the partnership, if any can be said ever to have existed, was terminated by Richards, who had theretofore declined to go any further. This fact was known to the officers of the Bank. No partnership or other relation then existing as between Williams and Richards it was not incumbent upon him to have taken any action relative to the note sued upon. Williams in the signing of this note in Richards' name, acted as a mere volunteer and no duty existed upon Richards' part to repudiate his action upon its being brought to his notice, a positive affirmance being needed to make it binding upon him.

Mechem on Agency, Section 160.

But assuming for argumentative purposes only that Williams was the agent of Richards to a limited extent, and Williams had exceeded his authority in the

manner shown by the facts of this case, it was not the duty of Richards upon learning of the violation of his limited authorization, to seek the Bank and give it notice of his repudiation. His omission to do so or his mere silence would not be construed as a ratification of the note.

White vs. *Langdon,* 30 Vt., 599.

As a matter of fact as soon as knowledge of the making of the note in suit was brought home to Richards, by a letter from the Bank received December 28, 1911, while he was in California, he wrote to the Bank repudiating the action of Williams. This letter, dated January 2, 1912 (Tr. 208) was ruled out, but Richards further testified that when he reached Fairbanks in March, 1912, he personally called on Hurley at the Bank and reiterated his repudiation of the note (Tr. 211-245).

In giving the foregoing instructions the Court did not tell the jury that it was to consider the line of evidence therein set forth *in connection with all the other evidence in the case,* but by placing such undue prominence thereon must have impressed upon the minds of the jurors an importance in connection therewith entirely out of proportion to the facts and the law applicable thereto.

VI.

The Court erred in instructing the jury on its own motion that:

> "You are instructed that it was not necessary for Williams to have authority to bind Richards in the giving of the note sued on in this action before the execution of the same, provided you find that Richards thereafter ratified the acts of Williams.
>
> "And you are further instructed that such ratification need not be expressed in writing. But his failure to disaffirm the acts of Williams within a reasonable time, or to repudiate the actions of Williams and notify the plaintiff thereof in this action within a reasonable time, may be held to constitute a ratification of the acts of defendant Williams so that the defendant Richards will then become liable for such indebtedness. Of course, an act of ratification, either by failure to protest, or by express affirmative acts, implies that the party had full knowledge of such acts as had been done by his agent; and, unless he had such knowledge, he would not be held to have ratified them by any failure to act or disaffirm them. Ratification means a confirmation of an act previously done by another."

The Court instructed the jury as above upon a theory of the case entirely absent from either the pleadings or the issues made in the case.

The complaint sues the defendants as partners and alleges the existence of a *mining* partnership as between Williams and Richards, the borrowing of $3500 by *them* and the making of the note sued upon,

signed in the alleged firm name as well as in the individual names of the parties.

The answer of Richards denying all of these allegations, the only issues raised were as to the borrowing of the moneys alleged to be the consideration for the note sued on, the existence of a mining partnership and the making of the note of February 24, 1911. There was no issue as to ratification. There was a total failure to prove the mining or any partnership. There was a total failure to prove prior authorization from Richards to Williams to borrow the money, to sign the first note in the partnership name or to sign the note in controversy in his individual name or otherwise.

As a forlorn hope the plaintiff directed its forces to proving ratification of the action of Williams, and the Court below evidently adopting the attitude of the plaintiff, sought by this and the other instructions complained of on this point, to urge upon the jury the fact that there had been ratification. For it says in terms after instructing that the ratification need not be in writing—*"but his failure to disaffirm the acts of "Williams within a reasonable time or to repudiate "the action of Williams and notify the plaintiff "thereof in this action within a reasonable time, may "be held to constitute a ratification of the acts of de- "fendant Williams so that the defendant Richards "will then become liable for such indebtedness."*

The principle seems to be settled that where one

assuming to act as agent has no *actual* authority, subsequent mere silence on the part of the principal, or his failure to repudiate, cannot as a matter of *law* (as distinguished from the question of *fact*) create any liability. The significance of such silence or failure to repudiate does not concern estoppel or creation of ostensible agency based upon estoppel. Ostensible agency or estoppel only applies when the antecedent negligence of the principal gives rise to belief in the mind of a third party that the agency exists, which belief must be so caused and present when the business is done.

Mere subsequent silence, or failure to repudiate an unauthorized act of agency, can concern only ratification. Ratification is a question of fact (i. e. the intention of the principal) for the jury and not of law for the Court. It is true that after the principal learns of the unauthorized act his failure to repudiate may be a *fact* proper to be considered by the jury in connection with *all the circumstances of the case,* in reaching this determination of the question of fact as to whether or not there has been a ratification. In *law* there is no duty incumbent upon a principal to disaffirm an unauthorized act. It is only when the failure of the principal to disaffirm becomes, in the light of *all* of the principal's conduct, an affirmative factor or fact from which the jury may infer the intention to ratify, that silence has any significance, and then not because of any duty of the principal to disaffirm.

There is not a scintilla of evidence in this case showing any failure of Richards to repudiate the action of Williams in the making of the note sued on, as we have hereinbefore shown. On the contrary, it appears that he received the bank's notice on December 28, 1911, and answered repudiating Williams' action therein on January 4, 1912, and when he reached Fairbanks in March of that year, called on the bank and again repudiated the action of Williams.

This instruction is specially vicious in that the Court does not qualify the aforesaid statement to the jury by "should you find a failure to disaffirm the acts of Williams . . ." but says in terms, his failure to disaffirm within a reasonable time may be held to constitute a ratification, expressly stating that there was a failure, and does not state that a failure *if found* is *a fact* to be considered in connection with *all* the other evidence in the case concerning the making of the said note.

The instruction of the Court that mere silence would in this case warrant an inference of intention to ratify, places the Court in the position of invading the province of the jury; but the jury decides what inferences are to be drawn from evidence, not the Court, and the jury must consider silence in conjunction with all the facts of the case in considering whether the inference of intention to ratify should probably be drawn.

> "Ratification takes place when one person adopts a contract made for him, or in his name, which

is not binding on him because the one who made it was not duly authorized to do so. *Ratification is a question of fact;* and, in the great majority of instances, turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred. Story, Ag. Secs., 253-260. And, generally, deliberate and repeated acts of the principal, with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification."

Oregon Ry. Co. v. *Oregon Ry. & Nav. Co.*, 28 Federal Rep., 507.

The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he is intended to be; in the latter he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In the one case the party is bound because the contract contains the necessary ingredients to bind him, including a consideration. In the other he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct

and acts being what they purported to be, without apprising him to the contrary.

Forsyth v. *Day,* 46 Me., 176.

Under the facts of this case no estoppel can be said to have arisen as against Richards, for the bank from the outset negotiated with Williams only and knew that Williams had no authority to act for Richards in borrowing the money *originally* to purchase the additional interest in the lease. No benefit is shown to have flowed to Richards from the acts of Williams and there is nothing to show that the bank was influenced by any act or conduct of Richards in entering into the *original* contract of loan or that it suffered any detriment or prejudice by reason of any such conduct or acts.

VII.

The criticism, authorities and argument advanced against the two preceding instructions is also applicable to the instruction assigned as Specification of Error VII. It would be trespassing upon the patience and time of the Court to reiterate the same.

VIII.

The Court erred in refusing to give in full the following special instruction requested by the defend-

ant Richards, and in giving only the first two paragraphs thereof:

"The Court instructs the jury that a mining partnership can only exist where several parties cooperate in working mining property; mere ownership as tenants in common, either of the mining ground itself or a leasehold thereon, not being sufficient.

"Where a mining copartnership is shown to exist within the definition above given, each partner has power to bind his copartners by dealing on credit and the giving of promissory notes for the purpose of working the mine, where it appears to be necessary or usual in the management of the business; but one mining copartner has no implied power or authority to borrow money and sign the firm name to a promissory note as evidence of such loan, where the money is to be and is used in purchasing mining ground or interests therein or assignments of leases thereon, and if he does so without the knowledge or consent of his copartners they are not liable thereon.

"Applying the law as given above to the testimony in this case, I charge you that if you find from the testimony that no mining co-partnership existed between the defendants Edward Williams and Edwin Richards on the 24th day of February, 1911, the date of the note which is the subject of this action; or if you find that they were on and before said day such co-partners but that the money evidenced by the said promissory note was, on or before that date and without the knowledge or consent of the defendant Edwin Richards, borrowed by the defendant Edward Williams from the plaintiff bank, for the purpose of being used in the purchase of an interest in a lease on Flat Creek in the Iditarod country and that said money was

so used, then in either event the defendant Edwin Richards is not liable upon the said note; unless afterwards, with full knowledge of all the material facts connected therewith, he ratified the making and signing of the said note by the said Edward Williams. The word 'ratification' means a confirmation of a previous act done by another."

The error of the Court in giving only the abstract proposition of law advanced in the first two paragraphs in the foregoing proposed instruction without applying it to the evidence in the case as requested, is apparent, because the latter was a plain, unbiased and pertinent statement of the evidence as shown by the transcript. The defendant was entitled to this full instruction, for an abstract proposition of law, no matter how correct, not being applied to the evidence leaves the jury in doubt as to how it should be applied and the benefit of the law applicable to the case is thus lost.

The Court in its prior charge had instructed as to the existence of a general partnership between the defendants the duties and liabilities of which being entirely different from those of a mining partnership, and had referred to certain concrete evidence in discussing the formation of such general partnership. (See Assignments of Error, I, II, III, IV.) Giving then these later abstract propositions of law, on what constituted a mining partnership, confusion is likely to have resulted in the minds of the jury and they thus

had been misled in considering these later instructions, unapplied to any of the facts in the case.

The presentation of the instruction proposed in the skeletonized form given instead of in the fair application to the evidence requested by defendant constituted error.

> "An instruction is not only required to state correct legal principles but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane."

Abbitt vs. *Lake Erie etc. Co.,* 150 Md., 498.

> "When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such facts and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. *If the instructions are pertinent to any part of the testimony they should if correct be given without regard to the amount of evidence to which they apply."*

Vol 1 *Brickwood Sackett Instructions,* p. 160.

IX.

The Court erred in refusing to give in full the following special instruction to the jury requested by the defendant Richards and in giving only the first paragraph thereof:

> "The Court instructs the jury that the naked declaration or representation of one person that another person is his mining partner or that he is

that other's agent with authority to sign promissory notes by reason of such co-partnership, is not evidence of a mining partnership or agency, as against such other person.

"Applying the foregoing rule of law to the testimony in the case, if you find therefrom that on or about the 6th day of October, 1910, at Iditarod City and at the time the note of that date for $3,500.00 was signed by the defendant Edward Williams in the name of 'Richards & Williams' as shown by Plaintiff's Exhibit '5,' the said Williams declared and represented to C. J. Hurley, manager of the plaintiff bank, that he and the defendant Edwin Richards were mining co-partners, and for that reason he was authorized to borrow money and sign the firm name 'Richards & Williams' to a promissory note for the amount of money so borrowed, then I charge you that under such circumstances the said Hurley, acting for said bank, had no legal right to rely solely on such declaration or representation and if he did so it was at the peril and risk of the plaintiff bank. Under the conditions stated above it would have been the duty of the officers of the bank to make other and independent inquiries as to the truth of the statements made by Williams, and if you find from the evidence that the said officers failed to make such inquiries and that Williams was not at the time a mining co-partner with Richards and was not authorized to sign the note, the bank must bear the loss, if any, and not the defendant Edwin Richards.

"The Court further instructs the jury that all that is said above with reference to the note, Plaintiff's Exhibit '5,' applies with equal force to the note, Plaintiff's Exhibit '6,' made the basis of this action and copied in the body of the complaint, so far as the liability of the defendant Edwin Rich-

ards is concerned, growing out of the signature thereon 'Richards & Williams.'

"The note in action (Plaintiff's Exhibit '6') is also signed by individual names as follows: 'Edward Williams, Edwin Richards by Edward Williams, his attorney in fact.' With reference to such signatures, you are instructed that as the name of defendant Edwin Richards purports on the face of the note in action to have been signed by Edward Williams under the authority of a power of attorney, but the evidence conclusively shows that he had no power of attorney or other written authority to sign said note for defendant Richards, it follows that the plaintiff cannot recover against said Richards by reason of such individual signatures unless you should further find from a preponderance of the evidence that the defendant Edwin Richards, after full knowledge of all the material facts connected with the signing of the said note, ratified the action of the said Edward Williams in the execution and delivery thereof."

In this respect the Court gave the abstract proposition of law embodied in the first paragraph, but as in the specification of error just argued, refused to apply it to the evidence as requested. A reading of the evidence to which it was desired the Court should apply the said proposition of law will show its pertinency and tendency to establish the defense of Richards. The authorities cited to this point under Specification of Error VIII are equally applicable here.

The defendant was certainly entitled to an instruction along the lines proposed,—that Hurley acting for the Bank should have been on his guard, should not

have relied upon the representations of Williams as to Richards; and that it was the duty of the officers of the Bank to make independent inquiry as to the truth of such representations, and that if the jury found that Richards was not the mining partner of Williams at that time and was not authorized to sign the note, the Bank should bear the loss. Such an instruction states the correct rule of law.

Schumacher vs. *Sumner Tel. Co.,* supra;
Anderson vs. Kissam, supra.

Assuming Williams to have been the agent of Richards, it is yet the rule that

> "Parties dealing with an agent assuming to be authorized to draw, accept or endorse negotiable paper must see to it that his authority is adequate and both they and the agent must keep strictly within the limits fixed by the agent's authority or the principal will not be bound."

Mechem on Agency, Sec. 393.

And again says Mechem, in his work on *Agency,* Sec. 706:

> "Every person dealing with an assumed agent is bound *at his peril* to ascertain the nature and extent of the agent's authority. The very fact that the agent assumes to exercise a delegated power is sufficient to put the person dealing with him on his guard to satisfy himself that the agent really possesses the pretended power."

In the case at bar Williams had no express authority whatever to borrow the money represented by or to sign the original note or the so-called renewal note in suit. That may be said to be admitted (Tr. 180) and certainly no implied authority from the fact that he stated *he considered* Richards his partner and the evidence is clear that Richards had absolutely nothing to do with the operations of the mine.

If by any process of tortuous twisting of the facts of this record we could find authority in Williams to execute the first note, that surely would give him no power to renew the same.

Mechem on Agency, Sec. 393.
Ward vs. *Bank of Kentucky,* 7 T. B. Mon. (Ky.), 93.

And certainly the balance of said proposed instruction viewed in the light of the evidence, stated a correct proposition of law.

X.

The Court erred in refusing to give the following instruction asked by defendant Richards:

"Where a promissory note is signed by one person for another, as that other's attorney in fact, as the note copied in the complaint was, the one taking such note is put on his guard by the form of the signature and is bound to inquire whether the person so assuming to sign for such other, in fact held a power of attorney or other written authority to so

act, and if it turn out that he did not have such written authority the note is void as against such other.

"Applying the foregoing rule of law to the testimony in this case, if you find from the evidence that the defendant Williams on February 24, 1911, did not have a power of attorney or other written authority from the defendant Richards authorizing him to sign the name of the defendant Richards to promissory notes, then the action of the said Williams in signing the note was ineffectual to bind Richards and he would not be liable for the payment thereof; unless you should further find from a preponderance of the evidence, that, after being fully informed of all the facts in the premises, he ratified the action of Williams in signing his name to the note."

There was nothing in the charge of the Court covering the same ground set forth in the foregoing proposed instruction and the jury were certainly entitled to be instructed as to the legal effect of a note signed by one individual in the name of another without that other's authorization so to do, especially when the evidence shows that when the note of February 24, 1911, was signed by Williams in Richards' name he expressly stated that he had no power of attorney to act for Richards nor any other written authority. The Bank through its President Hurley, was fully aware of this fact. Hurley testified as follows:

"Q. When you made that second note and mortgage, you were told distinctly then that this man

Williams did not have any power of attorney or any written authority from Richards?

"A. Certainly. I never understood that he had" * * * (Tr. 180).

It would not seem to require any citation of authority other than those heretofore called to the attention of the Court to show the correctness of the legal proposition advanced in the foregoing instruction, based as it is upon pertinent and competent testimony in the record.

XI.

The Court should have admitted in evidence the letter from Williams to Richards dated June 27, 1911, Defendant's Ex. 3, Tr. 126-7 (Assignment of Error XI).

A) This letter should have been allowed to go to the jury in connection with the letter of Williams of April 4, 1911, Defendant's Ex. 2, (Tr. 124-5) wherein Williams wrote to Richards enclosing the bill of sale of any interest that Richards might be said to have in the ground covered by the lay by reason of its having been made out jointly in his and Williams' name by the act of Williams. In that letter Williams assured Richards that when the bill of sale was returned Richards would "be relieved of all obligations in connection with the proposition." And further assured him that *"if you want some security for the money you*

gave me I can give you the quarter interest which I still hold" (Tr. 124-5).

The letter of June 27, 1911, is complementary to the letter of April 4, 1911, for in it Williams acknowledges receipt of the return of the deed from Richards. "I must thank you for sending me the deed" (Tr. 126), expresses worry that it might have been lost because of the delay, and then to show his anxiety to repay Richards the money he had loaned him, goes on to state that—

> "The Guggenheims are in camp—they have options on most of Flat Creek. We let them an option for $33,000. They also take all machinery and wood at cost price and also pay all running expenses if they take it up, which expires August the first. * * * *Should they take it up I will come direct to the Springs and make good"* (Tr. 127-8).

These letters taken together tend to throw light upon the true relations existing between the defendants Williams and Richards and serve to weaken the attempted proof that Richards was familiar with the making of the note in controversy and by acquiescence ratified the same. There is nothing in the letter of April 4, to show that any new note had been made. On the contrary Williams says:

> "Well, Dick, I assumed the responsibility of this proposition, doing as you advised me to do; consider you out of it. I was compelled to sell half interest to secure the note I gave last fall. In pur-

chasing it last fall I had the bill of sale recorded in yours and my name, but I cannot cancel the note till you send me the bill of sale which you will find enclosed. Then you will be relieved of all obligations in connection with the proposition. Angus McKenzie and Angus McLellan are the parties that I sold to. I got $4500 for the half interest in the lay—just enough cash down to pay the back interest on the note—$400 and giving a mortgage till July 1st, 1911" (Tr. 124).

Not a word as to a new note signed in the individual name of Richards! And in fact, Richards never heard of this new note until December, 1911, in San Francisco, (Tr. 206) long after the receipt of the letter of April 4, 1911, and long after the return of the deed evidenced by the letter of June 27, 1911, which the Court ruled out.

As the question of Richards' ratification of the note in controversy by silence was the subject of a portion of the charge of the Court, the letter of June 27, 1911, was peculiarly competent testimony, taken in connection with the letter of April 4, 1911, to show that no knowledge of the actual facts concerning the making of the note in controversy was brought home to Richards until long after the making of the same, for if he had knowledge that Williams had used his name in making the note sued on, he would hardly have also re-conveyed to Williams whatever interest he had in the ground in addition to making himself liable on the note. Therefore the fact that this deed was re-

turned to Williams and so acknowledged by him was of moment as well as Williams' promise to go direct to Hot Springs and make good the moneys Richards had given him.

XII.

The Court should have admitted the letter written by the defendant Richards to the Bank, dated January 2, 1912 (Defendant's Ex. 6, Tr. 286).

This letter was written immediately after the first notification that Richards had of the making of the note in controversy, and in which he repudiated the same in terms. There is nowhere in the record any evidence that Richards ever had any knowledge of this note of February 24, 1911, until as he says he got a letter from the Bank on December 28, 1911, when he was in San Francisco, notifying him that it had been made and demanding payment (Tr. 240). There is no contradiction of this fact. Some effort was made to show that Williams conveyed that information to him in the letter of April 4, 1911, (Tr. 124) but a reading of that letter will show that all reference to the making of the new note of February 24, 1911, was carefully and prudently omitted. So that Richards' testimony remains unshaken as to his entire lack of knowledge until his belated receipt of the notice from the Bank on or about December 28, 1911, in San Francisco, where it had been forwarded to him, and to which he replied almost immediately on January 2,

1912, repudiating the note and the action of Williams. That this letter should have gone to the jury there is no question. The Court afterwards instructed the jury that the effect of "the failure of Richards to disaffirm " the acts of Williams within a reasonable time or to " repudiate the actions of Williams and notify the " plaintiff thereof in this action within a reasonable " time may be held to constitute a ratification of the " acts of defendant Williams so that defendant Rich- " ards will then become liable for such indebtedness," (Assignment of Error VI, Tr. 279) yet Richards is deprived of the only means of showing actual disaffirmance and repudiation to the Bank of the action of Williams in making the note within a reasonable time after knowledge of the material facts was brought home to him, by the action of the Court in excluding his letter to the Bank of January 2, 1912.

We submit the error of the Court in this respect seems too plain for argument and the same was vital to the defendant Richards for, upon the withdrawal of this evidence from the consideration of the jury, may have hinged its decision in arriving at a verdict against him for failure to disaffirm within a reasonable time, and a ratification have therefore been assumed.

In conclusion we submit that for the errors argued, the judgment of the Court below should be reversed. This case is unique in that there was absolutely proven out of the mouth of the plaintiff's witness Williams, that there was no partnership of any kind or character

existing as between him and Richards, yet a judgment is rendered against defendant Richards as a member of such non-existent partnership! It was also proven out of the mouth of the plaintiff through both its witness Williams and its President Hurley, that the plaintiff bank had full knowledge that Williams had no power or authority to sign the name of Richards to the note of October 6, 1910, or to the note of February 11th, 1911, sued upon. Furthermore, as we have shown, the evidence is uncontradicted in the record that Richards had no knowledge of the making of the note sued on until December 28, 1911, and immediately repudiated the making of the same to the Bank by letter four days later. Yet the Court, after ruling out the letter of repudiation, instructed the jury that Richards' failure to disaffirm within a reasonable time was a ratification! Therefore a judgment is rendered against Richards individually also on this note! Certainly a judgment based on such a record of evidence and such a charge of the Court should not be allowed to stand.

We respectfully ask that for the reasons given, the said judgment be reversed.

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